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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

DIETER H. M. TROSTER,
Petitioner,

v.

PENNSYLVANIA STATE DEPARTMENT OF CORRECTIONS, JOSEPH D. LEHMAN, COMMISSIONER, FREDERICK ROSEMEYER, SUPERINTENDENT,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Witold J. Walczak
ACLU OF PENNSYLVANIA
237 Oakland Avenue
Pittsburgh, PA 15213

Stefan Presser
ACLU OF PENNSYLVANIA
125 So. 9th Street
Philadelphia, PA 19107

John H. Bingler, Jr.
Counsel of Record
THORP, REED & ARMSTRONG
One Riverfront Center
Pittsburgh, PA 15222
(412) 394-7785

Seth F. Kreimer
3400 Chestnut Street
Philadelphia, PA 19104-6204

Attorneys for Petitioner
Dieter H. M. Troster

QUESTIONS PRESENTED FOR REVIEW

I. Whether a State Corrections Department regulation compelling American flag display on an employee's work uniform, adopted in response to a request from a public employee union during the 1991 Persian Gulf War, constitutes compelled expressive conduct subject to First Amendment scrutiny.

II. Whether a State Corrections Department employee's refusal to wear an American Flag, as a protest, can be, as the Circuit Court below held, "expressive in fact yet not protected by the First Amendment *as* symbolic expression."

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Dieter H. M. Troster respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on September 13, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, not yet reported, appears as Appendix A hereto, pages 1a - 33a. That opinion affirmed the decision of the District Court which denied plaintiff's request for a preliminary injunction. The opinion of the District Court, not yet reported, appears as Appendix B hereto, pages 34a - 60a.

STATEMENT OF JURISDICTION

The judgement of the United States Court of Appeals for the Third Circuit was entered on September 13, 1995. This Petition for Certiorari was filed within 90 days of that date.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution Amendment I:

> Congress shall make no law . . . abridging the freedom of speech, ...

U.S. Constitution Amendment XIV. Section 1:

No State shall . . . deprive any person of life, liberty or property, without due process of law; . . . .

STATEMENT OF THE CASE

Petitioner Dieter Troster, an employee of the Pennsylvania Corrections Department, "is in danger of losing his job . . . because, as a matter of principle, he refuses to wear an American flag patch on his uniform as required by departmental regulations." Opinion of the Court of Appeals ("Opinion") 3a. As the Court of Appeals stated: "Troster believes that the regulation in question unconstitutionally requires him to engage in expressive conduct in violation of his First Amendment rights." Opinion 33a.

Troster is a naturalized American who emigrated from Germany in his early twenties. Opinion 5a. Troster's emigration was motivated by a trip to the former Nazi concentration camp at Dachau, an experience that left him, as he testified:

> deeply ashamed of being associated with anything like that, even by inference. An honorable symbol, the Star of David, was the central focal point of a government that persecuted millions of people because they were different in one way or another and branded them with that respectable, that honorable religious symbol. And at the time I made up my mind that I would

> pursue whatever methods necessary to immigrate . . . .

District Court February 3, 1994 Hearing Transcript at page 12.

> After emigrating to the United States, Troster enlisted in the U.S. army, . . . became an officer, and was eventually promoted to the rank of Major. In 1981 he retired after twenty years of service, including time in Viet Nam. Two years later Troster secured employment with [the Corrections Department]. He has since received promotions . . . [to] the rank of Sergeant.

Opinion 5a - 6a.

> Troster is a deeply patriotic American citizen with obvious devotion to his adopted country and to the principles of freedom and democracy embodied in our system of government. Troster has a sincere reverence for the American flag and the principles it symbolizes.
>
> For Troster, the American flag, properly displayed, symbolizes the principles of freedom and democracy embodied in our system of government.

> He voluntarily displays his father-in-law's burial flag, properly folded and in a lighted display case, in his home. He also voluntarily flies another American flag outside of his home on national holidays and other occasions.

District Court Opinion 35a - 36a.

> Troster [objects] to being compelled to display the American flag. He believes that state-compelled display desecrates the flag and debases it. Troster considers the required displays deeply objectionable . . . because of his conviction that the American flag symbolizes freedom from state-coerced political or patriotic speech, ...

Opinion 7a.

The flag display regulation was adopted in response to a request by a public employee union during the 1991 Persian Gulf War. (Opinion 6a). Initially, compliance was optional. In 1993, the Department made the regulation mandatory, but did not enforce it after receiving a letter of objection from Troster. "Operations ran smoothly [at the institution where Troster works] during this time." Opinion 8a. Then, in January 1994 the Department began enforcing the regulation and, "despite the fact that Troster's performance . . . had otherwise

been completely satisfactory" (Opinion 8a), commenced disciplinary proceedings against him.

Troster refused to wear the flag, and on January 26, 1994, filed the instant 28 U.S.C. §1983 action seeking preliminary and permanent injunctive relief to exempt him from compliance with the regulation. The District Court had jurisdiction pursuant to 28 U.S.C. §§1331 (general federal question jurisdiction) and 1343(a)(3) (general federal constitutional question jurisdiction).

After a hearing, the District Court denied both Troster's preliminary injunction request and his motion for an injunction pending appeal. The District Court concluded that Troster had failed to demonstrate a likelihood of success on the merits because "neither the flag patch regulation nor Troster's refusal to wear the patch was sufficiently expressive to be protectable under First Amendment free speech rights." (Emphasis added.) Opinion 9a.

Because the District Court concluded that compelling American flag display did "not compel expression" under the First Amendment, the court found it "unnecessary . . . to conduct the Pickering [v. Board of Educ., 391 U.S. 563, 88 S. Ct. 1731 (1968)] balancing [of interests] test." District Court Opinion 57a. The District Court did, however, indicate how it thought such a balancing would turn out.

> The court must also observe it is not overwhelmed by the State's argument that its interests are served by requiring that an American flag patch be worn as part of the corrections officer's uniform. It does not appear that mass insurrection among inmates or corrections officers would break-out if the patch remained an optional item of apparel, nor does the court discern any other significant adverse consequences that might befall the State Correctional Institutions.

District Court Opinion 58a.

On April 4 and 5, 1994, Troster filed a notice of appeal and a motion for an injunction pending appeal. The Court of Appeals granted Troster's motion for an injunction pending appeal.

On September 13, 1995, the Court of Appeals affirmed the District Court. The Court of Appeals held that Troster had "not at this point met his burden [of proof] under Spence [v. Washington, 418 U.S. 405, 94 S. Ct. 2727 (1974)] "(Opinion 13a) that the flag patch regulation required him to engage in conduct "sufficiently imbued with elements of communication that the regulation might be forbidden by the First Amendment's proscription against compelled speech." Opinion 5a.

The Circuit Court indicated that Troster should have "presented the district court with . . . evidence (for example, surveys) suggesting that [others] would be likely to view the wearing of the patch as communicative or expressive. . . ." (Opinion 18a).

The Circuit Court stated that:

> Thus, sympathetic as we may be to Troster's genuine patriotism as well as with his predicament, we cannot accept his suggestion that we hold, as a matter of "common sense" and law, that the mere act of wearing a uniform with a flag patch on it constitutes an expressive or communicative "use" of the flag, cf. Spence, 418 U.S. at 410, 94 S. Ct. at 2730 ("The Court for decades has recognized the communicative connotations of the use of flags.") (emphasis supplied), within the scope of the First Amendment.

Opinion 19a.

With respect to Troster's argument that his refusal to wear the flag constituted symbolic protest, the Circuit Court held that "even if" Troster's refusal is expressive in fact (Opinion 20a and 22a), he cannot present both a compelled expression claim and a symbolic protest claim

to the Court, because his "symbolic protest claim is . . . wholly derivative from his compelled expression claim . . . ." Opinion 27a. The "essence" of his claim, according to the Court (Opinion 27a), was his objection to State-compelled expressive conduct. "The symbolic protest theory simply adds a desire to communicate his opposition to others." Opinion 23a.

On September 28, 1995, in response to a motion by petitioner Troster, the Court of Appeals granted a stay of mandate pending this petition for certiorari. Fed. R. App. P. 41(b).

If this petition for certiorari is granted, Troster will ask this Court to hold that both State-compelled American flag display and Troster's refusal to display the flag are subject to First Amendment scrutiny, and remand to the District Court to apply the Pickering balancing of interests test.

REASONS FOR GRANTING THE WRIT

This Case Presents Important Questions About The Scope Of The First Amendment's Protection For Expressive Conduct. Conflicts In The Decisions Of The Lower Courts Demonstrate The Need, Particularly Since Hurley v. Irish American Gay Group of Boston (1995), For This Court To Clarify The Rules For Ascertaining When Expressive Conduct Is Subject To First Amendment Scrutiny. The Third Circuit's Decision In The Instant Case Is In Sharp Conflict With The 1994 Decision Of The Eighth Circuit In Dunn v. Carroll, And With The Eleventh Circuit's 1983 Decision In Leonard v. City of Columbus.

I. Petitioner's Compelled Expression Claim - The Need For A Test To Determine What Conduct Is "Speech".

No satisfactory test currently exists for ascertaining when expressive conduct is "speech" subject to First Amendment scrutiny.[1] The absence of a workable test has left the States, their employees and citizens, and the lower courts without guidance as to what conduct, like the

---

[1]See, Tiersma, Nonverbal Communication and the Freedom of Speech, 1993 Wis. L. Rev. 1525, 1531.

American flag display in the instant case, can be compelled or prohibited under the First Amendment.

The absence of a workable test has caused conflicts among the circuits, like the obvious conflict between the Third and the Eighth Circuits, on the question of whether displaying an American flag patch on a public employee's work uniform is expressive conduct for First Amendment purposes. The Third Circuit held in the instant case that the compelled display of an American flag patch on a public employee's work uniform, in response to a request from a public employee union during the 1991 Persian Gulf War, did not constitute compelled expressive conduct. The Third Circuit indicated that petitioner should have presented surveys to prove that others seeing petitioner wearing an American flag patch would view such conduct as expressive.

The Eighth Circuit, in contrast, held in Dunn v. Carroll, 40 F.3d 287 (1994), that a public employee's voluntary display of an American flag patch on his work uniform during the military build-up prior to the Persian Gulf War was expressive conduct. The Eighth Circuit needed no surveys to reach this conclusion. A sharper conflict is hard to imagine.

A similar conflict exists between the Third Circuit's opinion in the instant case and the Eleventh Circuit's opinion in Leonard v. City of Columbus, 705 F.2d 1299 (1983), cert. denied, 468 U.S. 1204, 104 S. Ct.

3571 (1984) (Police officers' removal of department-compelled American flag patches from their uniforms to protest alleged racial discrimination was symbolic speech). The Eighth Circuit relied on Leonard in reaching its decision in Dunn.

These conflicts result from the unsettled state of the law, and, as Justices O'Connor, Kennedy and Souter stated in Planned Parenthood v. Casey, ___ U.S. ___, ___, 112 S. Ct. 2791, 2803 (1992): "Liberty finds no refuge in a jurisprudence of doubt."

In the period between Spence v. Washington, 418 U.S. 405, 94 S. Ct. 2727 (1974) (voluntary display, peace symbol on flag) and Hurley v. Irish-American Gay Group of Boston, _____ U.S. _____, 115 S. Ct. 2338 (1995) (compelled conduct, parade case) many lower

> courts and commentators . . . interpreted Spence to require [as a test for demarcating speech from noncommunicative conduct] both an intent to convey a particularized messsage and a great likelihood that this message will be understood. (Emphasis added).

Opinion 11a-12a.

This Court's unanimous decision in Hurley, expressly rejected this interpretation of Spence. "[A]

narrow, succinctly articulable message is not a condition of constitutional protection . . . ." Hurley, ___ U.S. at ____, 115 S.Ct. at 2345. Hurley did not, however, provide a First Amendment coverage test to replace the "particularized message" language in Spence.

Since Hurley, the lower courts are left to gauge the expressiveness of conduct by asking

> whether, considering the "nature of [the] activity, combined with the factual context and environment in which it was undertaken," [leads] to the conclusion that the "activity was sufficiently imbued with the elements of communication to fall within the scope of the First and Fourteenth amendments . . . ." Spence, 418 U.S. at 409-10, 94 S. Ct. at 2730.

Opinion 13a.

Restated, this amounts to: under all the circumstances, did the conduct have sufficient elements of communication to be communication? Defining "communication" as something that has sufficient elements of communication (without defining the "elements") leaves "communication" undefined and un-"tested".

In the absence of a test, the States, their employees and citizens, and the lower courts are forced to make

decisions by analogy, leaving losing parties and potential litigants uncertain about why an analogy was or was not found, or whether one will be found. In the instant case the Circuit Court looked for analogous cases and found, and then distinguished, its own Lipp v. Morris decision, 579 F.2d 834 (3d Cir. 1978) (Student cannot be compelled to stand at attention during the pledge of allegiance). Opinion 15a. The Circuit Court found a "gap between Troster's case and Lipp . . . ." Opinion 11a. This "gap" was found even though the Circuit Court "fully" recognized

> that the flag [of the United States] is a unique symbol in our history, one "[p]regnant with expressive content." Texas v. Johnson, 491 U.S. 397, 405, 109 S. Ct. 2533, 2540 (1980) (voluntary conduct, American flag burning).

Opinion 15a-16a.

The Circuit Court nevertheless held that being compelled by the State to display the American flag on one's work uniform, based on a request from a public employee union during the 1991 Persian Gulf War, did not compel "conduct sufficiently imbued with elements of communication" (Opinion 5a) to be subject to First Amendment scrutiny. We submit that being compelled by a State to display a flag that is "pregnant with expressive content" constitutes being compelled to engage in conduct

sufficiently "imbued with elements of communication" to be subject to First Amendment scrutiny. "Pregnant with" and "imbued with" have identical meanings.

The absence of a workable test for demarcating "speech" from noncommunicative conduct leaves prospective plaintiffs uncertain, at least in cases where there is a "colorable compelled expression claim" (Opinion 33a), as to:

(a) Whether the courts will "assum[e] for the sake of argument that specific conduct is a type of speech." Tiersma, Nonverbal Communication, 1993 Wis. L. Rev. at 1531.

(b) Whether the "speech"/non-"speech" demarcation is a matter of law for the courts, or a matter for preliminary review by the courts, or a matter of fact for the factfinder.

(c) Which party should bear the burden of proof as to the communicative or noncommunicative character of State-compelled conduct with respect to the American flag.

Thus, particularly since Hurley, the demarcation between expressive conduct, "speech", covered by First Amendment and noncommunicative conduct which is not covered, is uncertain.

Establishing a test to make the demarcation is clearly an "important question of federal law which . . . should be settled by" this Court. Supreme Court Rule Rule 10(c).

II. Petitioner's Symbolic Protest Claim Is Independent And Distinct From His Compelled Expression Claim

The Court of Appeals refused to consider whether petitioners symbolic protest, his public and publicized refusal to comply with the flag patch regulation, was "speech" covered by the First Amendment. Even though the Circuit Court stated that the "symbolic protest theory . . . adds a desire to communicate" (Opinion 23a), the Court nevertheless held that a "compulsion to speak may be addressed, either as a symbolic protest claim, or as a compelled speech claim, but not both." Opinion 21a. This holding, which seems to require a First Amendment claimant to make an election of remedies, misinterprets and is in conflict with the very decision the Circuit Court cites to support it, Wooley v. Maynard, 430 U.S. 705, 97 S. Ct. 1429 (1977). It is also in conflict with U.S. v. Eichman, 496 U.S. 310, 110 S. Ct. 2404 (1990).

The Circuit Court's misinterpretation of Wooley manifests itself most starkly in the Court's statement that "the fair implication of [Wooley] is that certain conduct might be expressive in fact and yet not protected by the

First Amendment as symbolic expression." Opinion 32a. It is this stark misreading of Wooley that allows the Circuit Court to state that its "conclusion that Troster cannot press both theories is further supported by the Supreme Court's treatment of the First Amendment claims in Wooley . . . ." Opinion 29a.

In Wooley this Court found it "unnecessary" to rule on petitioners' symbolic protest claim (the petitioners had protested by covering over New Hampshire's "Live free or die" motto with red reflecting tape), because this Court found more appropriate First Amendment grounds "to affirm" the judgment of the three judge District Court. Wooley, 430 U.S. at 713, 97 S.Ct. at 1434. This Court never says in Wooley that a symbolic protest claim is derivative from a compelled speech claim. The District Court in Wooley had analyzed petitioners claim as a symbolic protest claim, concluding that petitioners affirmative act of covering the State's motto was constitutionally protected expressive conduct. On appeal, this Court found, on the record before it, that displaying "expurgated" plates (ones issued without the state's motto on them) would not constitute "symbolic expression" (referencing footnote 1 in the opinion which reveals that plates without the motto were common because the plates for a number of types of vehicles did not carry the motto). However, this Court expressly refused in footnote 10 to decide whether taping over the motto was sufficiently communicative to constitute symbolic expression. In the instant case, the Circuit Court, to glean support from

Wooley, conflated the symbolic protest of taping over the State's motto with the noncommunicative display of "expurgated" plates.

In Wooley this Court held that displaying expurgated plates was not expressive in fact. From this the Circuit Court in the instant case somehow reaches a conclusion that presumes that Wooley held the exact opposite: that the "fair implication of Wooley is that certain conduct might be expressive in fact and yet not covered by the First Amendment as symbolic expression." Opinion 32a.

In fact, Wooley provides no support for the Circuit Court's conclusion that a First Amendment claimant cannot pursue both a compelled expressive conduct claim and a symbolic protest claim.

Troster's symbolic protest claim is not "wholly derivative" from his compelled expression claim because, as the Circuit Court itself stated, the "symbolic protest theory . . . adds [an executed] desire to communicate" (emphasis added) (Opinion 23a) to what would otherwise be only a compelled expression claim. Exactly, "adds". Petitioner Troster not only objected in his mind to the compelled flag display regulation, he decided to communicate his objection to the Department and his colleagues, both verbally and in writing, and by refusing to obey the compulsion. He could have merely sued in the District Court on his compelled expression claim. Instead

he decided to both sue in the District Court and communicate his objection.

As Wooley in fact suggests, a plaintiff who symbolically protests a law or regulation which colorably compels expression in violation of the First Amendment can proceed on both a symbolic protest claim and a compelled expression claim and is entitled to have the expressiveness, the "speech", of both the protest and the compelled conduct assessed by the courts.

The Constitution does not require an election of remedies. The symbolic protest of refusing to "speak" when compelled to do so adds a new and independent communicative act which must be separately scrutinized under the First Amendment. Petitioner Troster's symbolic protest can supply the expressive-in-fact conduct that compels the next step the courts take in First Amendment cases, the Pickering balancing analysis. The Court of Appeals could not legitimately avoid balancing the governmental interests under the symbolic protest analysis simply because it declined to do so on the compelled speech claim.

The Court of Appeals held that "the First Amendment does not protect any 'right' to disobey a governmental compulsion for the sole purpose of expressing a protest against the compulsion on the grounds that it allegedly requires one to engage in speech or expressive conduct." Opinion 22a. This holding is in

direct conflict with this Court's decision in U.S. v. Eichman, 496 U.S. 310, 110 S. Ct. 2404 (1990). In both of the cases reviewed by the this Court in Eichman, the defendants burned flags in violation of the then recently enacted Flag Protection Act as a symbolic protest directly against the prohibition in the Act itself. See U.S. v. Eichman, 731 F. Supp. 1123, 1128 (D.D.C. 1990), aff'd 496 U.S. 310, 110 S. Ct. 2404 (1990); U.S. v. Haggerty, 731 F. Supp. 415, 416 (W.D. Wash. 1990) aff'd 496 U.S. 310, 110 S. Ct. 2404 (1990). Despite the fact that the defendants were protesting the very law they violated, a law whose constitutionality was just as questionable as the regulation in this case, this Court never hesitated in proceeding to decide whether the flag burning was symbolic protest, "speech", subject to First Amendment protection.

Eichman "spoke" to protest a prohibition against speaking. Troster is refusing to speak as a protest against a compulsion to speak. There is no reason why refusing to speak as a protest against a regulation that compels speech should be less protected than speaking as a protest against a statute that prohibits it. In fact, just the opposite is the proper constitutional order. It is well settled that "involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence." West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 633, 63 S.Ct. 1178, 1183 (1943). See also, Taylor v. Mississippi, 319 U.S. 583, 63 S.Ct. 1200 (1943) (decided

on the same day as Barnette. Defendant's conviction for encouraging resistance to compelled flag salute reversed).

We submit that granting certiorari in this case would provide this Court with an opportunity to discuss and articulate a test for demarcating "speech" from non-communicative conduct. Granting certiorari would also provide this Court with an opportunity to establish that symbolic protests against State compulsions to "speak" should receive at least the same degree of First Amendment protection as symbolic protests against State prohibitions against "speaking".

The Court could also use the opportunity to establish that State-compelled display of the American flag, because the flag "is a unique symbol in our history, one '[p]regnant with expressive content'" (Opinion 11a.), is always subject to First Amendment scrutiny.

CONCLUSION

For the foregoing reasons a Writ of Certiorari should be granted to the Court of Appeals for the Third Circuit.

Respectfully submitted,

John H. Bingler, Jr.
Counsel of Record

THORP, REED & ARMSTRONG
One Riverfront Center
Pittsburgh, PA 15222
(412) 394-7785

Witold J. Walczak
ACLU OF PENNSYLVANIA
237 Oakland Avenue
Pittsburgh, PA 15213
(412) 681-7864

Stefan Presser
ACLU OF PENNSYLVANIA
125 So. 9th Street
Philadelphia, PA 19107
(215) 592-1513 Ext. 216

Seth Kreimer
Pa. I.D. #26102
3400 Chestnut Street
Philadelphia, PA 19104-6204
(215) 898-7447

Attorneys for Petitioner
Dieter H. M. Troster

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 94-3162

DIETER H.M. TROSTER
v.
PENNSYLVANIA STATE
DEPARTMENT OF CORRECTIONS;
JOSEPH D. LEHMAN, COMMISSIONER;
FREDERICK ROSEMEYER, SUPERINTENDENT

DIETER TROSTER,
Appellant

On Appeal From the United States District
Court For the Western District of
Pennsylvania (D.C. Civ. No. 94-cv-00131)

Argued: September 22, 1994

Before: BECKER, COWEN, Circuit Judges,
and GARTH, Senior Circuit Judge

(Filed: September 13, 1995)

BRUCE V. HICKS, ESQUIRE
(ARGUED)
JOHN H. BINGLER, ESQUIRE
Thorp, Reed & Armstrong
One Riverfront Center
Pittsburgh, PA 15222

WITOLD J. WALCZAK, ESQUIRE
American Civil Liberties Union
237 Oakland Avenue
3rd Floor
Pittsburgh, PA 15213

Counsel for Appellant

ERNEST D. PREATE, JR., ESQUIRE
Attorney General
THOMAS F. HALLORAN, JR. ESQUIRE
(ARGUED)
GLORIA A. TISCHUK, ESQUIRE
CALVIN R. KOONS, ESQUIRE
JOHN G. KNORR, III, ESQUIRE

Office of Attorney General
of Pennsylvania
564 Forbes Avenue
Manor Complex
Pittsburgh, PA 15219

Counsel for Appellees

OPINION OF THE COURT

BECKER, Circuit Judge.

Appellant Dieter Troster, an employee of the State Correctional Institution at Greensburg, Pennsylvania ("SCI"), is in danger of losing his job as a corrections officer because, as a matter of principle, he refuses to wear an American flag patch on his uniform as required by departmental regulations. He filed suit in the District Court for the Western District of Pennsylvania against the Pennsylvania State Department of Corrections, its Commissioner Joseph D. Lehman, and SCI Superintendent Fredric A. Rosemeyer, seeking injunctive and declaratory relief under 28 U.S.C. § 1983. After holding an evidentiary hearing, the district court denied Troster's request for a preliminary injunction. The Pennsylvania Department of Corrections then ordered Troster suspended

for five days for gross insubordination. This court granted an emergency motion for an injunction pending appeal, and Troster has remained on the job. Troster has appealed the district court's order denying him a preliminary injunction.

Troster advances two theories to support his allegations that the threatened disciplinary action violates his rights under the First and Fourteenth Amendments. First, he advances a "compelled speech" argument--that the flag patch regulation that he refuses to observe unconstitutionally compels him to engage in expressive or symbolic conduct. Second, he presses a "symbolic protest" theory, under which he urges that his refusal to comply with the department regulation should be protected as expressive or symbolic conduct intended and likely to communicate his opposition to being compelled to "speak" by wearing the flag patch.

In Part II of this opinion we hold that Troster did not demonstrate a likelihood of success on the merits of his compelled expression claim. Even recognizing that in the wake of Hurley v. Irish-American Gay Lesbian and Bisexual Group of Boston, 115 S. Ct. 2338, 2344 (1995), the threshold test of expressiveness necessary to raise a First Amendment compelled expression claim is no longer as stringent as we previously suggested in Steirer by Steirer v. Bethlehem Area Sch. Dist., 987 F.2d 989 (3d Cir. 1993), see infra at 10-12 & n.1, we believe that on the record before it the district court properly concluded

that the Department's flag patch regulation did not require correctional officers such as Troster to engage in any conduct sufficiently imbued with elements of communication that the regulation might be forbidden by the First Amendment's proscription against compelled speech.

With respect to the alternative symbolic protest theory, we conclude in Part III that, under the particular facts of this case, Troster has not stated an analytically independent claim of constitutional violation. One who violates a governmental compulsion to speak or engage in expressive conduct merely to express opposition to that compulsion on "compelled expression" grounds engages in no independently constitutionally protected conduct. In such a case the appropriate rubric for a First Amendment claim is simply "compelled expression," and that is therefore the sole free speech theory that we consider. As noted, it fails on the present record. Accordingly, the order of the district court denying Troster's motion for a preliminary injunction must be affirmed.

1. FACTS AND PROCEDURAL HISTORY

Dieter Troster is a naturalized American who emigrated to the United States from Germany when he was in his early twenties. He enlisted in the U.S. army, went to Officers' Candidate School, became an officer, and was eventually promoted to the rank of Major. In 1981 he retired after twenty years of service, including time in Viet

Nam. Two years later Troster secured employment with SCI. He has since received promotions taking him from Corrections Officer Trainee to Corrections Officer 2 with the rank of Sergeant. His duties include supervising inmates acting as janitors and directing other corrections officers in their assigned tasks. Troster is also a Training Sergeant, and he thus serves as an example to lower ranking corrections officers.

In 1991, the American Federation of State, County and Municipal Employees, the bargaining representative for the corrections officers, requested the Department to allow officers to wear an American flag patch on their uniforms. The Department adopted a regulation allowing officers up through the rank of Sergeant to wear an American flag patch on the right shoulder sleeve of their uniform shirts. The patch authorized by the Department displays the flag with the star field oriented toward the officer's back (with the star field in its customary position in the upper left corner of the flag). Although the original regulation was permissive, on February 15, 1993 the Department promulgated new uniform regulations (effective March 15) that mandated display of the flag patch on the right sleeve of the uniform shirt, star field oriented toward the rear.

The Department adopts regulations concerning uniforms, including the flag patch regulation, with the intent of projecting the image of a professional correctional force. The district court found that such an

image is important to the overall operations and security of SCI. The presence of the American flag patch is now one of the identifying features of a corrections officers's uniform, which indicates, the district court found, that the wearer is authorized to exercise the lawful powers of corrections officers, including the use of firearms. The district court accepted Superintendent Rosemeyer's contention that the Department's interest in displaying the American flag as part of the uniform is legitimate because it fosters loyalty and obedience to superior officers.

Almost immediately upon adoption of the mandatory flag patch regulation, Troster objected to being compelled to display the American flag. He believes that state-compelled display desecrates the flag and debases it. Troster considers the required displays deeply objectionable not only because of his conviction that the American flag symbolizes freedom from state-coerced political or patriotic speech, but also because, in his view, displaying the flag with its star field to the rear signifies cowardice and retreat from the principles for which the flag stands. Troster further believes that the "New Flag Code" Resolution adopted by Congress in 1976, 36 U.S.C. §§ 173-177, does not authorize corrections officers to wear the flag as part of their uniform (although he does not press this argument on appeal). In May 1993, in response to Troster's objections, the Department decided not to enforce the flag patch regulation pending review by the Department's General Counsel. Thus, the regulation remained optional or unenforced from the spring of 1991

to January 27, 1994, with few if any disciplinary problems resulting. Operations ran smoothly at SCI during this time.

Nevertheless, despite the fact that Troster's performance as a corrections officer had otherwise been completely satisfactory, on January 20, 1994 the Superintendent of SCI notified Troster that the Department would begin enforcing the flag patch requirement on January 27, and that he must comply or face disciplinary proceedings. Troster continued to refuse to wear the flag, and on January 26 he filed this 28 U.S.C. § 1983 action seeking declaratory and injunctive relief against the mandatory aspect of the Department's flag patch regulation. The next day the Department ordered Troster to appear at a fact finding meeting.

There, Troster was advised that his continuing refusal to comply with the regulation constituted gross insubordination and violated specific paragraphs of the Correctional Officer's Code of Ethics. A disciplinary hearing was set for February 8. In the interim, however, a short-term agreement between Troster's and the Department's counsel allowed Troster to continue working without wearing the patch. Except for that temporary dispensation for Troster, the Department has enforced the regulation uniformly since the end of January 1994.

On February 1, 1994, Troster moved for a preliminary injunction against the Department's attempts

to discipline him and against the mandatory aspect of the flag patch regulation on which those proceedings were based. On February 3, the district court held a hearing on this motion, at which time the Corrections Department agreed to stay disciplinary proceedings against Troster until the court ruled on the injunction.

By order dated March 18 the district court denied Troster's motion. The court concluded that Troster had failed to demonstrate a likelihood of success on the merits because neither the flag patch regulation nor Troster's refusal to wear the patch was sufficiently expressive to be protectable under First Amendment free speech rights. Five days later, Troster moved for reconsideration or injunction pending appeal. Two days after this motion the Corrections Department held a pre-disciplinary conference; four days later the district court denied Troster's request for reconsideration. On April 4 Troster filed a notice of appeal. The next day, he moved in this court by motion for an emergency injunction pending appeal. Defendants notified Troster that if he continued to refuse to wear the flag patch, he would be suspended for five days commencing April 9. On April 8, a motions panel of this court granted Troster's motion for an injunction pending appeal. We have jurisdiction under 28 U.S.C. § 1292(b). We review the grant or denial of a preliminary injunction for abuse of discretion; the district court's discretion is abused if it erred in stating or applying the law. See Frumer v. Cheltenham Twp., 709 F.2d 874, 876 (3d Cir. 1983).

2. THE COMPELLED EXPRESSION CLAIM

a.

Troster objects to the compulsory aspect of the Department's flag patch regulation on the grounds that it compels him to engage in expressive conduct in violation of the First Amendment. "[T]he protection granted by the First Amendment is not limited to verbal utterances but extends as well to expressive conduct." Steirer by Steirer v. Bethlehem Area Sch. Dist., 987 F.2d 989, 994 (3d Cir. 1993). Moreover, "[t]he freedom of speech protected by the First Amendment, though not absolute, includes both the right to speak freely and the right to refrain from speaking at all." Id. at 993 (quoting Wooley v. Maynard, 430 U.S. at 714, 97 S. Ct. at 1435) (internal quotation marks and footnote omitted).

We are not dealing here with compelled disclosure of personal or private information. See, e.g., Leora Harpaz, Justice Jackson's Flag Salute Legacy: The Supreme Court Struggles to Protect Intellectual Individualism, 64 TEX. L. REV. 817, 818 (1986) (distinguishing "[t]wo distinct kinds of liberty interest [that] support the right to refrain from expressive activity[,] . . . . an interest in not being forced to reveal information about personal beliefs or associations . . . . [and] an interest in not being forced to belong to any organization or to make any statements when [individuals]

would rather be silent or express different views") [hereinafter Harpaz, Intellectual Individualism]; Shelton v. Tucker, 364 U.S. 479, 484-90, 81 S. Ct. 247, 250-53 (1960) (public school teacher need not reveal all organizations to which teacher has belonged). Instead, the issue is whether the flag patch requirement "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control," West Virginia St. Bd. of Educ. v. Barnette, 319 U.S. 624, 642, 63 S. Ct. 1178, 1187 (1943).

The threshold issue with respect to Troster's compelled expression claim is whether the flag patch regulation required Troster to engage in expressive conduct. In Steirer by Steirer v. Bethlehem Area School District, 987 F.2d 989 (3d Cir. 1993), this court held that, in order for governmentally compelled conduct to be considered "expressive" within the meaning of the First Amendment, the actor must have "[a]n intent to convey a particularized message . . . and in the surrounding circumstances the likelihood [must be] great that the message would be understood by those who viewed it.'" Id. at 995 (quoting with alteration Spence v. Washington, 418 U.S. 405, 410-11, 94 S. Ct. 2727, 2730 (1974) (per curiam) (emphases supplied here). When determining whether conduct is expressive for First Amendment purposes, many other courts and commentators have also interpreted Spence to require both an intent to convey a

particularized message and a great likelihood that this message will be understood.

Whether or not this reading of Spence was justified,[1] the Supreme Court just this past term has made clear that "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' cf. Spence v. Washington, 418 U.S. 405, 411, 94 S. Ct. 2727, 2730 (1974) (per curiam), would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schonberg, or Jabberwocky verse of Lewis Carroll." Hurley v. Irish-American Gay Lesbian and Bisexual Group of Boston, 115 S. Ct. 2338, 2345 (1995) (citation omitted).

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[1] Spence, which has become the touchstone for evaluating whether conduct is expressive for First Amendment purposes, contained no language of necessity. A particularized intent and a likelihood that the message would be understood were present in that case, but the Supreme Court did not say that those were always required for expressive conduct. Rather, after discussing the context in which Spence's protest occurred, the next paragraph of the Court's opinion "noted, further, that [Spence's conduct] was not an act of mindless nihilism." Id. at 410, 94 S. Ct. at 2730. In concluding the paragraph elaborating this observation, the Court simply explained that in Spence's case, "[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." Id. at 410-11, 94 S. Ct. at 2730.

In light of Hurley, we believe that Steirer's restrictive test is no longer viable, and that the expressiveness of conduct should be gauged by the language that Spence explicitly articulated as a test: whether, considering "the nature of [the] activity, combined with the factual context and environment in which it was undertaken," we are led to the conclusion that the "activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments . . . ." Spence, 418 U.S. at 409-10, 94 S. Ct. at 2730. This test for determining whether the flag patch requirement compels "expression" from Troster and the other corrections officers is a fact-sensitive, context dependent inquiry. And, Troster's contentions to the contrary notwithstanding, we apply this test not only to symbolic protest cases (see discussion infra) but also to cases alleging compelled expressive conduct. The burden of proof concerning this question is on Troster, and, as we now explain, he has not at this point met his burden under Spence.

b.

We note at the outset of our analysis that this case is unlike most of the Supreme Court's compelled expression cases in that it does not involve actual verbal or written expression. In Barnette, the plaintiff schoolchildren were required to salute the American flag and to recite the pledge of allegiance. 319 U.S. at 628-29, 63 S. Ct. at 1180-81. In Wooley v. Maynard, the

plaintiffs were required to display the written ideological slogan "Live Free or Die" (New Hampshire's state motto) on their license plates. Even in Abood v. Detroit Board of Education, 431 U.S. 209, 97 S. Ct. 1782 (1977), "a state-required contribution by public school teachers to a labor union's activities was deemed expressive conduct, but only to the extent those union activities involved the expression of political views, the support of political candidates or the advancement of other ideological causes." Steirer, 987 F.2d at 995 (citing Abood, 431 U.S. at 234-36, 97 S. Ct. at 1799-1800).

In contrast to Wooley, Barnette, and Abood, the compulsion to which Troster objects does not involve words, which convey a clear ideological message.[2] Even if other drivers or pedestrians did not think that the Maynards (as opposed to the state) were the source of the message "Live Free or Die," the message was being delivered to such bystanders. Here, in contrast, flag patch observers are presented with a symbol that has various and somewhat imprecise ideas associated with it. Completely

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[2]Although other Supreme Court cases involved First Amendment challenges to required statements that were not ideological, see, e.g., Riley v. National Federation for the Blind, 487 U.S. 781, 795-801, 108 S. Ct. 2667, 2676-80 (1988) (invalidating law requiring professional fundraisers to disclose to donors percentage of contributions turned over to charities), these are more properly viewed as "compelled disclosure" cases, rather than "intellectual individualism" cases like Barnette, Wooley, and Abood. See Harpaz, Intellectual Individualism, 64 TEX. L. REV. at 818-19.

aside from the question of misattribution, see, e.g., Hurley, 115 S. Ct. at 2349 (reserving the question of "the precise significance of the likelihood of misattribution"), the record does not sustain the conclusion that the flag patch on the correctional officers' uniforms will relay any message (ideological or otherwise) to anyone; Troster has presented no evidence that it is likely to function in a communicative fashion.

The conduct required of Troster bears a slightly greater resemblance to that demanded of the plaintiff in Lipp v. Morris, 579 F.2d 834 (3d Cir. 1978), where a high school student successfully challenged the requirement that she "show full respect to the flag while the pledge is being given merely by standing at attention" during the flag salute and recitation of the Pledge of Allegiance. Id. at 835 n.2 (emphases supplied). We also recognize some similarity among the governmental purposes in Barnette, Lipp, and here: in Barnette the state required students to salute the flag and recite the Pledge of Allegiance in order to promote national unity, see 319 U.S. at 631 n.12, 63 S. Ct. at 1182 n.12; in Lipp the state required the plaintiff to stand in order to demonstrate respect for the flag; and here the state required Troster to wear the flag in part to foster loyalty and obedience to his superior officers. Additionally, we may agree with Troster that the flag of the United States is an "obviously expressive element," Br. of Appellant at 26-27 (quoting Steirer, 987 F.2d at 995), and we are fully cognizant that the flag is a unique symbol in our history, one "[p]regnant

with expressive content." Texas v. Johnson, 491 U.S. 397, 405, 109 S. Ct. 2533, 2540 (1989).

Nevertheless, we think that the gap between Troster's case and Lipp is not one that we may bridge on the present record. As the Supreme Court has admonished, not every action taken with respect to the flag is expressive. Id. Under the circumstances in Lipp, the conduct required of the plaintiff plainly could be seen as a demonstrative act of respect for the flag shown by her (coerced) actions. She was required to stand silently at attention, displaying respect, while her classmates saluted the flag. The government had thus specifically required that she engage in conduct manifesting an attitude. Here, however, it is not apparent from the record that the conduct required of Troster--passively wearing the flag patch--is similarly demonstrative of an attitude or belief.[3] Rather, there is presently no basis for concluding that the requirement that Troster wear the flag patch on his uni-

[3]We are aware--and if Troster establishes the communicative nature of the flag patch regulation at the final hearing the district court should bear in mind--that in Wooley v. Maynard, the Supreme Court recognized that "[c]ompelling the affirmative act of a flag salute involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on [one's] license plate, but" it considered "the difference [to be] essentially one of degree." 430 U.S. at 715, 97 S. Ct. at 1435 (quoted in Laurie Allen Gallancy, Teachers and the Pledge of Allegiance, 57 U. CHI. L. REV. 929, 939 (1990)).

form compels him in effect "to profess any statement of belief or to engage in any ceremony of assent to one." Barnette, 319 U.S. at 634, 63 S. Ct. at 1183.[4]

Troster was one of an entire force of corrections personnel required to wear the flag patch on their uni-

[4]From the failure of the opinion in Lipp to mention "record evidence that standing during the flag ceremonies conveyed a particularized message," Br. of Appellant at 26, and the approving citation of Lipp in Steirer, 987 F.2d at 994, Troster argues that "the Steirer court could not have enunciated a principle that required record evidence to support the proposition that the act in question will be understood in a particular fashion, as the District Court required in this case," Br. of Appellant at 26-27. The district court, at the time properly following Steirer, may have searched for too narrow a message in the act of wearing the flag patch. See discussion supra n.1 and accompanying text. However, neither that fact nor the lack of citation to record evidence in the Lipp opinion relieves Troster of the burden of showing that the flag patch regulation compelled him to engage in expressive conduct. The state-coerced conduct at issue in Lipp was a ceremonial gesture--"standing at attention"--occurring in the midst of even more blatant expressions of respect for the flag, all confined to a brief set period each school day. Here, the conduct at issue is the wearing of a small patch on a uniform sleeve throughout the entire work day. We do not agree with Troster that it is "readily inferable," Br. of Appellant at 27, that wearing a flag patch on a corrections officer's uniform "would be seen by most, if not all, observers as showing respect for the flag," id., and we do not think it too great a burden on Troster's First Amendment interests to require him to come forth with some evidence to support his otherwise bare assertion that the flag patch regulation compels expressive conduct.

forms. Evidence at the hearing showed that the uniforms of a large number of organizations have flag patches on them. Troster, however, presented the district court with no evidence (for example, surveys) suggesting that anyone (other than himself) would be likely to view the wearing of the patch as communicative or expressive, or that people who wear such uniforms with such flag patches actually assert anything to anyone. Observers might perhaps infer that the wearer is patriotic, but Troster put on no evidence that observers would likely understand the patch or the wearer to be telling them anything about the wearers' beliefs. Cf. Peter Meijes Tiersma, Nonverbal Communication and the Freedom of "Speech", 1993 WIS. L. REV. 1525, 1554 & n.122 (citing H.L.A. Hart, Signs & Words, 2 PHIL. Q. 59, 61-62 (1952), discussing whether neighbor shutting windows in preparation for coming storm asserts something thereby, and concluding "no") [hereinafter Tiersma, Nonverbal Communication].

We do not know whether survey data might be available to support Troster's expressive conduct claim. Perhaps Americans (or even an appropriate subset thereof, such as inmates and staff of and visitors to SCI) do in fact perceive people who wear (for example) a Boy Scout, Girl Scout, or police uniform with a flag patch as expressing a patriotic or other ideological message or agreement therewith; perhaps not.

Our duty, however, is to evaluate Troster's likelihood of success on the basis of the evidence

presented. And as we discuss below, see infra at 21-25, the Supreme Court has cautioned that the First Amendment should not be held to shield a limitless variety of conduct from governmental regulation. Thus, sympathetic as we may be to Troster's genuine patriotism as well as with his predicament, we cannot accept his suggestion that we hold, as a matter of "common sense" and law, that the mere act of wearing a uniform with a flag patch on it constitutes an expressive or communicative "use" of the flag, cf. Spence, 418 U.S. at 410, 94 S. Ct. at 2730 ("The Court for decades has recognized the communicative connotations of the use of flags.") (emphasis supplied), within the scope of the First Amendment.

c.

In short, Troster has not at this time met his burden. The district court's factual conclusion that "[w]earing the flag patch on a corrections officer's uniform . . . does not convey any agreement or disagreement with all or any of the many things a flag may symbolize, or the Department's view of the flag," op. at 21, App. at 124, is sufficiently supported by the current record. Accordingly, we hold that Troster has not shown a reasonable likelihood of success on the merits with respect to his compelled expression claim, for he has not made the necessary threshold showing that he was (probably) coerced to engage in expressive conduct. Thus, Troster presented the

district court with no basis to have granted him a preliminary injunction.

3. VIABILITY OF THE SYMBOLIC PROTEST THEORY IN THESE CIRCUMSTANCES

a.

Troster's alternative theory is that, given the circumstances, his refusal to wear the flag patch required by the Department constituted symbolic expressive conduct protected by the First Amendment.[5] This raises the question whether Troster can present both the compelled expression and symbolic protest claims, that is, whether he has an analytically independent symbolic speech claim? While we do not gainsay that a refusal to comply with a governmental directive may in some cases amount to symbolic protest covered by the First Amendment, this is not one of those cases. Our narrow conclusion does not ignore the Supreme Court's historical solicitude for free speech claims, its high regard for a "preferred right[]," see, e.g., Smith v. People, 361 U.S. 147, 169, 80 S. Ct.

[5]Technically the First Amendment is inoperative against the states, but its strictures are nonetheless binding on the states via the Fourteenth Amendment. For simplicity, however, this opinion frequently refers only to the First Amendment.

215, 227 (Douglas, J., concurring), reaffirmed in several of the Court's recent decisions.[6] But we are satisfied that where, as here, a person seeks only to express opposition to what he or she perceives as a governmental compulsion to engage in speech or expressive conduct, refusing to comply with the very governmental compulsion at issue is not protected as symbolic protest under the First Amendment, for that theory obscures the nature of the interests at stake. Put differently, in circumstances such as these where there is a colorable claim that a governmental compulsion violates the First Amendment's restrictions on governmentally compelled speech, there are not two potentially viable arguments that the Constitution's free speech guarantees protect a person's refusal to comply with the governmental compulsion solely because of opposition to the compulsion. The compulsion to "speak" may be addressed either as a symbolic protest claim, or as a compelled speech claim, but not both. Here, as shall be apparent, the most apt rubric is compelled expression.

Our conclusion that Troster may not raise both a compelled expression claim and a symbolic protest claim grounded solely in objection to compelled speech is animated by the caution with which the Supreme Court has instructed courts to view symbolic conduct claims. The

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[6]In the 1994-1995 term, the Supreme Court ruled on eight free speech claims. "In seven of eight First Amendment-related cases, the party asserting free speech rights prevailed." 64 U.S.L.W. 3055 (Aug. 1, 1995).

Court has warned that not all conduct, even conduct involving the flag of the United States, is "expressive" for purposes of the First Amendment. See Texas v. Johnson, 491 U.S. at 405, 109 S. Ct. at 2540. We do not presume that Troster's refusal to wear the flag patch on his correctional officer's uniform was not expressive as a factual matter. See also infra at 22. Rather, we believe that as a legal matter, the First Amendment does not protect any "right" to disobey a governmental compulsion for the sole purpose of expressing protest against the compulsion on the grounds that it allegedly requires one to engage in speech or expressive conduct.

As Professor Tiersma has explained, a recurring jurisprudential concern "is that the Free Speech Clause may be invoked by anyone who violates a law, claiming to protest against it." Tiersma, Nonverbal Communication, 1993 WIS. L. REV. at 1585. For example, Tiersma recounts that in Cox v. Louisiana the Supreme Court stated that "[o]ne would not be justified in ignoring the familiar red light because this was thought to be a means of social protest." Id. (quoting Cox, 379 U.S. 536, 554, 85 S. Ct. 453, 464 (1965)). Similarly, Justice Scalia has observed that "virtually every law restricts conduct, and virtually any prohibited conduct can be performed for an expressive purpose--if only expressive of the fact that the actor disagrees with the prohibition." Barnes v. Glen Theatre Inc., 501 U.S. 560, 576, 111 S.Ct. 2456, 2466 (1991) (Scalia, J., concurring) (emphasis supplied) (cited in Tiersma, Nonverbal Communication,

1993 WIS. L. REV. at 1585-86). See also, e.g., State of Washington v. Adams, 479 P.2d 148 (Wash. App. 1971) (rejecting defendant's contention that his using a set net in violation of regulatory salmon fishing statute was "symbolic speech" protected by First Amendment where defendant's only purpose in using the net was to demonstrate the irrationality of the statute prohibiting its use).

As the foregoing discussion suggests, permitting parties to pursue a claim that the First Amendment grants them a right to violate a law solely as a means of publicizing their objection to that law would burden courts with essentially duplicative First Amendment claims. We believe that this problem is particularly acute where individuals violating a governmental compulsion to engage in some behavior merely assert that their violation expresses their belief that the compulsion unconstitutionally requires them to speak or engage in expressive conduct. In such circumstances, both the compelled speech and the putative symbolic protest theories involve the same objection: the individual does not want to be used by government as a mouthpiece to disseminate ideological messages. The symbolic protest theory simply adds a desire to communicate this opposition to others.

The addition of a constitutional symbolic protest claim to a compelled speech claim in this circumstance would only serve to give individuals an additional yet

futile bite at the apple.[7] We do not believe that the Constitution's free speech guarantees countenance such a waste of judicial resources (and of the governmental resources needed to defend such claims). It distorts the constitutional inquiry to shift the focus away from the government's interest in enforcing its expressive-conduct compulsion (despite opposition thereto), to focus instead on the individual's interest in communicating opposition by violating the compulsion, as Troster's dual theory would do. Rather, we believe that, in circumstances such as these, the goal of the individual's conduct is properly characterized with regard to the First Amendment as avoiding the compulsion, rather than expressing disagreement with it.

In sum, symbolic protest claims are not analytically independent of compelled expressive conduct claims in the circumstances that we have described. Courts must therefore determine which theory more accurately captures the

[7]Limited as our powers of imagination may be, we nevertheless cannot conceive of circumstances in which individuals' symbolic protest claims grounded solely in refusal to engage in allegedly coerced expressive conduct could succeed where the root expressive conduct claim failed. If government had an interest sufficient under the First Amendment to justify compelling individuals to deliver ideological messages despite their opposition, it seems that interest would also be sufficient to justify requiring the individual to deliver the message despite his or her desire to communicate that opposition (to either the message or the compulsion) by refusing to deliver it.

essence of the constitutional objection. Cf. Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 335,105 S. Ct. 3180, 3196-97 (1985) (holding that free speech claim essentially duplicating the objection presented in due process claim was of "no independent significance"). In this case, it is the compelled expressive conduct claim. We hold that Troster's conduct was not constitutionally protected as a means of symbolically expressing opposition, on compelled expression grounds, to the expressive conduct that Troster perceived the flag patch requirement to compel.

b.

This holding does not require us to reject the reasoning of Leonard v. City of Columbus, 705 F.2d 1299 (11th Cir. 1983), upon which Troster relies and which bears some factual similarity to the instant case. In Leonard, a number of police officers were disciplined for appearing in uniform without the flag patch required by departmental regulations. The officers had staged a public rally at which they removed their patches to protest racial discrimination within the police force. The court of appeals held that the officers' conduct amounted to symbolic speech protected by the First Amendment. See id. at 1304.

Troster suggests that this holding at the very least strongly counsels for a ruling in his favor. Leonard, however, is unlike this case in a crucial respect, which we

believe is what the district court was driving at when it distinguished Troster's situation from Leonard on the grounds that Troster lacked an "underlying political or patriotic message." Op. at 21 (JA 000124).

In Leonard, although the conduct at issue (the means of the officers' protest) was violation of the flag patch regulation, the object of the protest was not the regulation itself, but rather discrimination by the Department. The reason for the protest was that the Department's alleged racial discrimination violated their rights to equal protection of the laws, not a belief by the officers that the regulation compelled them to engage in expressive conduct in violation of their First Amendment rights. Thus, the officers were engaged in speech for some reason other than protesting being used as a governmental mouthpiece.

As in Leonard, the means of Troster's protest was also violation of a departmental flag patch regulation. In contrast to the officers' protest in Leonard, however, the object of Troster's protest was the regulation itself. The reason for Troster's violation was that the regulation allegedly unconstitutionally compelled him to "speak" by wearing the patch on his uniform. Thus, even if Troster engaged in symbolic speech by violating the flag patch regulation, he did so solely for the purpose of protesting the fact that (in his view) the regulation improperly compelled him to "speak." Hence, it is apparent that the reason for Troster's conduct--namely, his violation of the Department's flag patch regulation which was the basis for

the disciplinary proceedings that he seeks to enjoin permanently--the only point that he was trying to make, was that the regulation violated his First Amendment right not to be a mouthpiece for the government. Troster's symbolic protest claim is thus wholly derivative from his compelled expression claim, which is the essence of his objection to the flag patch regulation, and his free speech objection should accordingly be subject only to compelled expression analysis.[8]

Similarly, the symbolic protest claim in Spence v. Washington, 418 U.S. at 405, 94 S. Ct. at 2727, was not derivative of a compelled expression claim. There, Spence displayed an American flag with peace signs

[8]This derivative relationship would not be present in the case of a Rosa Parks sitting in the front of a segregated bus. If her actions were analyzed as expressive conduct, her message would not be that the ordinance requiring her to sit at the back of the bus was forcing her to say something. She would not be simply protesting being used as a mouthpiece to deliver some governmental message. Her message would be that the Jim Crow regime was denying her the equal protection of the laws. Thus, even if she were to raise both an equal protection and a symbolic protest claim against the governmental compulsion, her message--conveyed by her violation of the seating ordinance--would be more than simply opposition to being forced by the ordinance to "say" something, and thus she would have only one colorable free speech claim, and symbolic protest (rather than compelled expression) would be the appropriate mode of analysis. While the seating requirement certainly reflected a racist attitude or view about the dignity and social status of black Americans, objection merely to compelled "speech" simply would not have been the only message Rosa Parks sought to convey by her actions.

attached in order to protest American violence in Cambodia and Kent State. After being arrested for violating a law that prohibited improper display of the American flag, his successful claim was that he had a First Amendment right to express his message in that fashion, and that the state could not constitutionally punish him for doing so. Spence's means of expression was a violation of the flag display statute, but the reason for his protest, the message he sought to convey, was not a belief that the flag display statute (a prohibitory measure) compelled him to express something that he did not want to say. He was not protesting being forced to act as a mouthpiece for government. Thus, the free speech claim in Spence lacks the duplicative quality of Troster's claim(s), and that case does not help him establish independent viability of his symbolic protest theory.[9]

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[9]Indeed, even a person who burns a flag to protest a statute prohibiting flag burning would not have the same derivative structure to his or her claim. Certainly, the means of the symbolic protest would be a violation of the very law that is the object of the protest. But the reason for the protest would be a belief that the statute unconstitutionally prohibited him or her from speaking; while there may be viewpoint discrimination at work, there is no colorable compelled speech claim there. By prohibiting flag burning, the statute simply does not require the hypothetical banner burner to express anything. So there is just one free speech claim in this scenario: that government is unconstitutionally prohibiting an individual from speaking his or her mind. The flag burner cannot claim that the prohibition forces her to act as a mouthpiece for government, and there is thus no difficulty in letting the individual proceed with a symbolic protest claim.

c.

Our conclusion that Troster cannot press both theories is further supported by the Supreme Court's treatment of the First Amendment claims in Wooley v. Maynard, 430 U.S. at 705, 97 S. Ct. at 1428. The plaintiffs in that case were two Jehovah's Witnesses who objected on political and religious grounds to being required to display New Hampshire's state motto--"Live Free or Die"--that was imprinted on their license plate. After being prosecuted several times for covering the motto, the Maynards challenged the constitutionality of the state law making it a crime to obscure the motto, seeking injunctive relief prohibiting future prosecutions for their covering the motto (usually with red reflective tape). The Maynards argued both that their act of covering the motto was constitutionally protected because it was necessary for them to avoid a compelled affirmation of belief, and that their act constituted protected symbolic speech not outweighed by sufficient state interests. A three-judge district court declined to "consider whether their First Amendment right to be free from a required affirmation of belief is implicated," concluding instead that the Maynards' affirmative act of covering the motto was constitutionally protected expressive conduct. 406 F. Supp. 1381, 1386 (1976).

On appeal, the Supreme Court took a dramatically different approach to the case. The Court "found it

unnecessary to pass on the 'symbolic speech' issue," concluding that there were "more appropriate First Amendment grounds" on which to affirm the judgement of the district court. 430 U.S. at 713, 97 S. Ct. at 1434. The Court explained:

> We turn instead to what in our view is the essence of [the Maynards'] objection to the requirement that they display the motto 'Live Free or Die' on their automobile license plates. . . . We are thus faced with the question of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. We hold that the State may not do so.

Id., 97 S. Ct. at 1434-35 (emphasis supplied).

While the Court did not expressly rule that the Maynards had no viable symbolic protest claim, its opinion cast grave doubt on the prospects of that argument. As then-Justice Rehnquist interpreted the majority opinion, "the Court[] implicit[ly] recogni[zed] that there is no protected 'symbolic speech' in this case . . . ." Id. at 720, 97 S. Ct. at 1438 (Rehnquist, J., dissenting). Of particular note is the majority's assertion

that had the state granted the Maynards' request for special license plates not containing the state motto, the act of displaying them would not be "sufficiently communicative to sustain a claim of symbolic expression." Id. at 713 n.10, 97 S. Ct. at 1434 n.10. This observation alone could be virtually dispositive of Troster's symbolic protest claim.

The Court stated in Wooley that the display of a license plate without the state motto would not amount to constitutionally protected expressive conduct, see id. at 713 n.10, 97 S. Ct. at 1434 n.10, even though most other cars displayed plates with the motto, and even though "New Hampshire citizens [were] generally aware that individuals like the plaintiffs ha[d] been covering the 'Live Free or Die' on their license plates in order to express their opposition to the motto's implication that political freedom is the greatest good," see 406 F. Supp. at 1387 n.11. Similarly, since Troster opposes the flag patch regulation because he believes that it coerces him to engage in "speech" (actually, expressive conduct), we believe that his conduct in wearing his correctional officer's uniform without the flag patch, which is required and is in fact worn by all the other guards, would not be protected symbolic speech even if, as he argued before the district court, his contemporaneous and repeated explanations would insure that observers would likely understand the reason for his refusal.

In reaching this conclusion, we note that the Supreme Court in Wooley did not contest the evidence and the district court's conclusion, see id., that the people of New Hampshire would most likely understand the significance of the Maynards' acts. Rather, the Court concluded that the act of displaying "expurgated plates" would not "sustain a claim of symbolic expression." 430 U.S. at 713 n.10, 97 S. Ct. at 1434 n.10 (emphasis supplied). The fair implication of this is that certain conduct might be expressive in fact yet not protected by the First Amendment as symbolic expression.

In determining that Troster's conduct falls into this category, we emphasize that the Supreme Court focused on what it termed "the essence" of the Wooley's constitutional claim against the anti-defacement statute. The basis of the Maynards' claim was, constitutionally speaking, not that the law in question prohibited them from "communicat[ing] affirmative opposition to the motto." Id. Rather, the essence of their constitutional objection was that the State was requiring individuals to help disseminate an ideological message by displaying it on their private property. See id., 97 S. Ct. at 1434-35. This is not a symbolic protest issue, but a compelled expression issue, which is how the Court treated it.

Coming full circle, we believe that, as a matter of law, the essence of Troster's objection to the flag patch regulation is not that it limits his ability to protest being

used as a governmental mouthpiece. Rather, the essence of his claim is reflected by the stated reason for his protest: Troster believes that the regulation in question unconstitutionally requires him to engage in expressive conduct in violation of his First Amendment rights. This is a colorable compelled expression claim, and that is how we have analyzed his constitutional challenge to the Department's regulation in Part III supra.

In sum, because the message Troster wishes to communicate is simply opposition to the Department's flag patch regulation on compelled expression grounds, and because his preferred method of communicating this message is violation of the regulation, compelled speech analysis is the proper vehicle for his constitutional challenge. Since we have rejected that claim, the order of the district court denying Troster's motion for a preliminary injunction will be affirmed.

The injunction we granted Troster pending this appeal will be vacated. Parties to bear their own costs.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DIETER H. M. TROSTER,)
)
Plaintiff,)
)
v.)
)
STATE DEPARTMENT OF)
CORRECTIONS, JOSEPH D.)
LEHMAN, COMMISSIONER,)
AND FREDRIC A.)
ROSEMEYER,)
SUPERINTENDENT,)
)
Defendants.)

March 18, 1994

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff, Dieter H. M. Troster ("Troster"), seeks a preliminary injunction against the Pennsylvania State Department of Corrections (the "Department) and two of its officials, its Commissioner Joseph D. Lehman and Superintendent of the State Correctional Institution at Greensburg, Frederic A. Rosemeyer, to enjoin enforcement of the Department's regulation requiring him to wear an American flag patch on his corrections officer's uniform. An evidentiary hearing was held on February 3, 1994. This Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Troster is a retired United States Army Major who served for just over 20 years in the United States Army including service in Vietnam, and was a member of the 82nd Airborne Division of the United States Army (the "All American" Division).

2. A naturalized American who emigrated to the United States From Germany in his early twenties, Troster went to Officer Candidate School, became an officer and was promoted to the rank of Major.

3. Now age 55, Troster is a deeply patriotic American citizen with obvious devotion to his adopted

country and to the principles of freedom and democracy embodied in our system of government. Troster has a sincere reverence for the American flag and the principles it symbolizes.

4. For Troster, the American flag, properly displayed, symbolizes the principles of freedom and democracy embodied in our system of government. He voluntarily displays his father-in-law's burial flag, properly folded and in a lighted display case, in his home. He also voluntarily flies another American flag outside of his home on national holidays and other occasions.

5. Troster believes that voluntarily displaying the American flag is an expression of his political and patriotic support for the principles the flag stands for, including the First Amendment's freedom from state coerced political or patriotic speech; however, he believes that being compelled to display the American flag inherently desecrates the flag and debases its significance as a symbol of freedom from coerced political or patriotic speech. He also believes that wearing the flag with the star field facing to the rear signifies cowardice and retreat from the principles the flag stands for.

6. After retiring as a Major from the United States Army in 1981, Troster obtained employment with the Department as a corrections officer in 1983 at the State Correctional Institution at Greensburg ("SCI-Greensburg").

7. Since 1983 he has risen from Corrections Officer Trainee to Corrections Officer 1 to Corrections Officer 2 with the rank of Sergeant.

8. In the Spring of 1991, in response to a request from AFSCME (the American Federation of State, County and Municipal Employees, the bargaining representative for the corrections officers) the Department adopted a regulation allowing corrections officers with the rank of Sergeant and below, at their option, to wear an American flag patch on the right shoulder sleeve of their uniform shirts. The flag patch authorized by the Department displays the flag with the star field orientated to the rear (or to the left of the viewer).

9. The Department, by Administrative Directive DC-ADM 208, promulgated uniform regulations effective March 18, 1993, which included mandatory display of the flag patch on the right sleeve of the uniform shirt, star field orientated to the rear.

10. Almost immediately thereafter, Troster objected to being compelled to display the American flag based on his beliefs that: it desecrates the flag and debases its significance to display it when compelled to do so by the State, because the American flag itself should and does symbolize freedom from State coerced political or patriotic speech; displaying the flag with the star field to the rear desecrates the flag because it signifies

cowardice and retreat from the principles the flag stands for; and the "New Flag Code" Resolution adopted by Congress in 1976, 36 U.S.C. §§ 173-177, does not authorize corrections officers to wear the flag as part of their uniform.

11. In response to Troster's objection, the Department in May 1993 decided to take no action to enforce the flag patch regulation pending review by its General Counsel.

12. The fact that the flag patch regulation was optional from the Spring of 1991 to March 18, 1993 and was not enforced, though mandatory, from March 18, 1993 to January 20, 1994, apparently caused little or no discipline or other problems at SCI-Greensburg. Major Louis F. Folino, who is in charge of the corrections officers at SCI-Greensburg, conceded that operations ran "smoothly" at the institution during these periods.

13. On January 20, 1994, Troster was ordered by the superintendent to begin displaying the American flag on his uniform by January 27, 1994.

14. On January 26, 1994, pursuant to the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983, Troster filed this action seeking declaratory and injunctive relief against the mandatory aspect of the Department's American flag patch regulation.

15. Disciplinary action was initiated by the Department and Troster was ordered to appear at a fact finding meeting at 10:00 a.m. on January 27, 1994.

16. At that fact finding meeting, Troster was advised that his continuing refusal to display the required flag patch constitutes gross insubordination and violates several specified paragraphs in the Correctional Officer's Code of Ethics. A disciplinary hearing was scheduled for February 8, 1994.

17. In the meantime, by agreement between his attorneys and counsel for the Department, Troster was allowed to continue to work without displaying the flag patch. On February 1, 1994, Troster filed a Motion for a Preliminary Injunction against the Department's proceeding further to discipline him and against the enforcement of the mandatory aspect of the flag patch regulation, pending a full and final hearing on his request for a permanent injunction.

18. At the preliminary injunction hearing on February 3, 1994, stipulations and documentary evidence were introduced and Troster, Superintendent Rosemeyer and Major Folino testified. At the conclusion of the hearing, the Department agreed to abstain from further disciplinary action against Troster pending this Court's decision on his preliminary injunction motion.

19. Other than his non-compliance with the flag patch regulation, Troster's performance as a corrections officer by all accounts has been completely satisfactory.

20. Troster's refusal to wear the flag patch is solely because of his belief about and reverence for the American flag. His refusal to wear the flag patch has been quiet and dignified.

21. The Department's only reason for initiating disciplinary action against Troster is his refusal to wear the flag patch.

22. The authority of the Commissioner of Corrections to direct the operation of the Department is established by sections 201, 205, 506, and 901-B of the Administrative Code of 1929, Act of 1929, Act of April 9, 1929, P.L. 177, No. 175, as amended. (Pl. Ex. 1).

23. The Commissioner of Corrections has the authority to prescribe uniforms for Department corrections officers.

24. The Department through DC-ADM 208 has maintained uniform requirements for its corrections officers from at least 1984 to the present time. During that course of time, there have been changes in the uniform regulations and requirements mandated by the

Commissioner of Corrections. (Testimony of Supt. Rosemeyer).

25. On February 25, 1991, the Department adopted a requirement for displaying the flag patch on the right sleeve of corrections officers' uniforms. The effective date of this requirement for commissioned corrections officers was March 15, 1991. The effective date for this requirement for other correction officers was to be established when a sufficient number of flag patches were available. (Def. Ex. A).

26. On March 6, 1991, the superintendent at SCI-Greensburg notified uniformed personnel by memorandum the American flag patch would be worn by all uniformed personnel. That memorandum illustrated the only flag patch authorized to be worn on the right shoulder of the Department's uniform shirt and blouse, opposite the state shield on the left sleeve of the shirt and blouse. (Def. Ex. B). That patch orientated the star field to the rear.

27. On December 18, 1992, the Department issued DC-ADM 208, Uniform Regulations, scheduled to take effect on March 18, 1993. DC-ADM 208 VI.M.1. requires all corrections officers not already wearing the American flag patch to do so. (Pl. Ex. 1).

28. Notice of the revised DC-ADM 208 was circulated at SCI-Greensburg by the superintendent on February 5, 1993. (Def. Ex. D).

29. On March 16, 1993, the major of the guard issued a memorandum to shift commanders advising them of the effective date of revised DC-ADM 208 and directing them to insure compliance with its provisions, including the properly placed flag patch. (Def. Ex. G).

30. On March 29, 1993, the superintendent by memorandum reiterated his concern that all personnel maintain reasonable care of their uniforms and personal clothing as well as a neat, clean professional appearance. He further directed that no other insignia, buttons or decorations shall be worn on the uniforms unless officially authorized by the Commissioner. (Def. Ex. E).

31. The Department insists its corrections officers wear the appropriate uniform in accordance with DC-ADM 208. (Testimony - Supt. Rosemeyer, Maj. Folino).

32. Uniform regulations, including the wearing of the flag patch, are intended to result in the appearance of a professional correctional force. (Def. Ex. G).

33. The appearance of a professional correctional force is important to the overall operations and safety of SCI-Greensburg. (Def. Ex. D).

34. Corrections officers are permitted to use force, up to and including deadly force within the institution under appropriate circumstances, and receive annual

instruction and training on the use of force and fire arms. (Testimony - Maj. Folino).

35. The presence of the American flag patch is one of the identifying features of a corrections officer's uniform which indicates he or she is authorized to exercise these lawful powers. (Testimony - Supt. Rosemeyer).

36. The Department's interest in displaying the American flag as part of the uniform is based upon the belief that it fosters loyalty and obedience to superior officers. (Testimony - Supt. Rosemeyer, Maj. Folino).

37. The Department possesses a legitimate governmental interest in maintaining a uniform requirement, including the requirement that correction officers wear a flag patch on the right sleeve of their uniforms in the manner required by DC-ADM 208.

38. The Department does not prevent the wearer o the American flag patch from communicating verbally his or her idea on political or any other matters. (Pl. Ex. 4).

39. The Department has taken disciplinary action against other corrections officers who have refused to comply with DCADM 208 regarding hair length. (Testimony - Maj. Folino).

40. From March 18, 1993, to May, 1993, the flag requirement was enforced at SCI-Greensburg during roll call and other times. (Testimony - Maj. Folino).

41. On May 19, 1993, Troster's counsel wrote the chief counsel for the Department informing him of Troster's objection to wearing the American flag patch on his uniform and requested an exemption for Troster. (Pl. Ex 2).

42. On May 27, 1993, the chief counsel advised Troster's counsel that the Department would undertake a review of the policy requiring the American flag patch be worn on the right sleeve and that no disciplinary action would be taken against Troster for violation of the flag requirement pending that review. (Pl. Ex. 3).

43. From May 2, 1993, to January 27, 1994, the wearing of the American flag patch on the right sleeve wa not enforced at SCI-Greensburg. (Testimony - Supt. Rosemeyer, Maj. Folino).

44. The superintendent of SCI-Greensburg issued a memorandum to Troster advising him the requirement that the American flag patch be worn as prescribed by the DC-ADM 208 would be enforced effective January 27, 1994. (Pl. Ex. 4).

45. The Department has uniformly applied and enforced DC-ADM 208 generally, and in particular the flag patch requirement.

46. Superintendent Rosemeyer has uniformly applied and enforced DC-ADM 208, including the flag patch requirement, at SCI-Greensburg.

47. Continuing violations of DC-ADM 208 may result in disciplinary action against any officer who refuses to comply with the uniform requirement, including Troster. (Testimony - Supt. Rosemeyer).

48. No corrections officer at SCI-Greensburg other than Troster has refused to comply with the flag patch requirement of DC-ADM 208. (Testimony - Sgt. Troster, Maj. Folino).

49. Troster's refusal to comply with the flag patch requirement has detrimentally affected the morale at SCI-Greensburg. In the opinion of Superintendent Rosemeyer and Major Folino, Troster's refusal not only sets a bad example for other corrections officers, who are expected to comply with the uniform requirements and other Department regulations but also detrimentally affects his role as a training sergeant at SCI Greensburg. (Testimony - Supt. - Rosemeyer, Maj. Folino).

50. Honor guard uniforms from the American Legion display the American flag patch on the right sleeve with the star field to the rear; the Veterans of Foreign War uniform displays the American flag on the right sleeve with the star field to the rear; the Boy Scouts of America uniform displays the American flag patch on the right sleeve with the star field to the rear; and the Cub Scouts of America uniform displays the American flag patch on the right sleeve with the star field to (Samples of these uniforms were introduced at the evidentiary hearing.)

51. Similarly, the Pennsylvania Department of Corrections uniform displays the American flag patch on the right sleeve with the star field to the rear.

52. Troster introduced no evidence at the hearing with regard to the likely effect on an observer on seeing the American flag patch displayed on a corrections officer's uniform as prescribed by DC-ADM 208.

53. The Department has spent $37,344.00 since 1991 purchasing American flag patches for corrections officers' uniforms. (Declaration of Howard R. Steven).

CONCLUSIONS OF LAW

1. To obtain a preliminary injunction, a plaintiff must show irreparable harm and a reasonable probability of success on the merits. The courts also must consider

whether the preliminary injunction will harm the Defendant or other interested parties or the public and, if so, the extent of such harm as compared to the injury the Plaintiff will suffer if the preliminary injunction is not granted. In re Arthur Treacher's Franchise Litig., 689 F.2d 1137 (3d Cir. 1982); Campbell Soup v. Conagra, Inc., 977 F.2d 86 (3d Cir. 1992); J.C Penny Co. v. Giant Eagle, Inc., 813 F. Supp. 360, 367 (W.D. Pa. 1992), aff'd 995 F.2d 217 (3d Cir. 1993).

The grant of injunctive relief is an "extraordinary remedy, which should only be granted in limited circumstances," and the moving party naturally bears the burden of proof and persuasion. Instant Air Freight Co. v. C.F.Air Freight, Inc., 882 F.2d 797, 800 (3d Cir. 1989), quoting Frank's GMC Truck Center Inc. v. G.M.C., 847 F.2d 100, 102 (3d Cir. 1988).

IRREPARABLE HARM TO PLAINTIFF

2. The loss of First Amendment freedoms, in and of itself, constitutes irreparable harm. Elrod v. Burns, 427 U.S. 347, 374 (1976); In Re School Asbestos Litig., 842 F.2d 671, 679 (3d Cr. 1988).

LIKELIHOOD OF SUCCESS ON THE MERITS

3. The First Amendment protects not only the right to speak but also the right to refrain from speaking. West Virginia State Board of Education v. Barnette, 319

U.S. 624 (1943); Wooley v. Maynard, 430 U.S. 705 (1977); Lipp v. Morris, 579 F.2d 834 (3d Cir. 1978). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." Barnette, 319 U.S. at 642. (Emphasis added).

4. The "flag uniquely symbolizes the ideas of liberty, equality and tolerance -- ideas that Americans have passionately defended and debated throughout our history. The flag embodies the spirit of our national commitment to those ideals. United States v. Eichman, 496 U.S. 310, 321 (1990) (Stevens, J., dissenting) (declaring Flag Protection Act of 1989 unconstitutional restriction of First Amendment rights). See Texas v. Johnson, 491 U.S. 397, 405 (1989)(the "flag burning case" which spawned the Flag Protection Act of 1989--recognizing the American flag is "pregnant with expressive content").

5. An American citizen does not forfeit his or her First Amendment rights by becoming a public employee, even a uniformed public employee. The State may not constitutionally compel persons to relinquish their First Amendment rights as a condition of public employment, nor may the State discipline its employees solely for the exercise of those rights. Pickering v. Board of Education, 391 U.S. 563 (1968); Holder v. City of Allentown. 987

F.2d 188 (3d Cir. 1993); Leonard v. City of Columbus, 705 F.2d 1299 (11th Cir. 1983).

6. The scope of public employees' First Amendment rights must be determined by balancing the interest of the employee as a citizen in commenting upon or refraining from commenting upon matters of public concern, and the interest of the State in the efficiency of the public services it performs through its employees. Connick v. Myers, 461 U.S. 138, 150 (1983); Holder, 987 F.2d at 194-95.

7. The threshold step in the analysis is the determination of whether the public employee engaged in protected speech activity, Holder, 987 F.2d at 194, and if so, whether the public employee's speech or refusal to speak relates to a matter of public concern. Id., at 146 (1983); Rankin v. McPherson, 483 U.S. 378, 384 (1987).

8. It public employee's speech or refusal to speak relates to a matter of public concern, the State's burden in justifying the restriction or coercion of such speech varies depending upon the nature of the employee's speech or refusal to speak. If the employee's speech "substantially involves a matter of public concern, then the State must make a strong showing that restricting or coercing the speech is vital to the efficiency of the public service involved. Connick, 461 U.S. at 150, 152.

9. If the State coerces its employees or its citizens to engage in symbolic political or patriotic speech, it must have a compelling reason. Wooley, 430 U.S. at 714-15; Barnette, 319 U.S. at 633.

10. In restricting a public employee's First Amendment rights, the government must employ means closely drawn to avoid unnecessary abridgement. Elrod v. Burns, 427 U.S. at 362. A State may not choose means that unnecessarily restrict constitutionally protected liberty. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms. Even where the State's interest is "legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties [freedom from coerced political speech] when the end can be more narrowly achieved." Wooley, 430 U.S. at 716-17 residents compelled to display on license plates New Hampshire's motto, "Live Free or Die.")

11. The fact that some might not share Troster's views about the political and patriotic significance of displaying the flag does not weaken his First Amendment rights. Indeed, the "bedrock principle" undergirding the First Amendment 18 that minority and even unpopular views are fully protected and the government may not proscribe the free expressions of ideas "simply because society finds the idea itself offensive or disagreeable."

Eichman, 496 U.S. at 318-19, quoting Johnson, 491 U.S. at 414.

12. Nevertheless, Troster's personal beliefs, that corrections officers are not permitted to wear American flag patches on their uniforms and that wearing such patches with the star field orientated to the rear desecrates the flag and disserves the principles for which it stands, do not appear to be shared by others, and he has not submitted any authority to support these contentions.

In relevant portion, the Flag Code, upon which Troster in part relies, states: "No part of the flag should ever be used as a costume or athletic uniform. However, a flag patch may be affixed to the uniform of military personnel, firemen, policemen, and members of patriotic organizations." 36 U.S.C. § 176(j)- Corrections officers' uniforms are not "costumes" nor "athletic uniforms," and corrections officers are not "military personnel, firemen, policemen, or members of patriotic organizations." but, the Code neither prohibits nor authorize prison corrections officer to wear American flag patches.

Nor does the Flag Code address the orientation of the flag patch, but the V.F.W. and the American Legion (which clearly seem to qualify as patriotic organizations") and the Boy Scouts and Cub Scouts of America (which less clearly but arguably may be in that category) display flag patches on the right sleeves of their uniforms with the star fields to the rear. In any event, the Flag Code is

merely advisory and is not intended to proscribe conduct, nor does violation of its provisions provide a cause of action or a defense to an otherwise constitutional exercise of a municipality's authority to enact reasonable ordinances regulating the display of flags, signs and other displays. Dimmitt v. City of Clearwater, 985 F.2d 1565, 1572-74 (11th Cir. 1993).

13. Not every act or refusal to act with regard to the American flag qualifies as expressive conduct or symbolic speech. Spence v. Washington, 418 U.S. 405, 409-11 (1974); Johnson, 491 U.S. at 405 ("We have not automatically concluded . . . that any action taken with respect to our flag is expressive.").

14. Although conduct can be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments," Spence, 418 U.S. at 409, the Supreme Court has rejected the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." Johnson, 491 U.S. at 404, quoting United States v. O'Brien, 391 U.S. 367, 376 (1968). See also City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989)("it is possible to find a kernel of expression in almost every activity a person undertakes . . . but every such a kernel is not sufficient to bring the activity within the protection of the First Amendment").

15. As the Third Circuit has stated, conduct sufficiently imbued with elements of communication is entitled to First Amendment protection, "[s]pecifically, the actor must have '[a]n intent to convey a particularized message . . . and in the surrounding circumstances the likelihood [must be] great that the message would be understood by those who viewed it."' Steirer, 987 F.2d at 995, quoting Spence, 418 U.S. at 410-11. Dimmitt, 985 F.2d at 1569 n.2. The context in which a symbol is used is important and gives meaning to the symbol, Spence, 418 U.S. at 410, and to determine the threshold question of whether conduct is expressive at all, courts must look to the "nature of the activity in conjunction with the factual context and environment in which it is undertaken." Steirer, 987 F.2d at 995.

16. The court must make this determination from the viewer's perspective, Id., asking whether, to an observer, the compelled conduct "carries with it the same affirmation of a belief and an attitude of mind that is a prerequisite for First Amendment protection." Id. at 994, quoting Barnette, 319 U.S. at 633. Viewed in this manner and in the context of all of the surrounding circumstances, the Eleventh Circuit had little difficulty in finding the conduct of black police officer in the City of Columbus in publicly removing their flag patches from their uniforms in order to protect perceived widespread racial discrimination *within* the police department was expressive conduct protected by the First Amendment. Leonard, 705

F.2d at 1304-05 ("Removal of the flag] patch under these circumstances bears great similarity to pure speech. . . . In this context, [the officers'] interest in peaceful, effective expression of their views was great, and we accord it commensurate weight.").

17. Regulations concerning choice of uniform, equipment, appearance, hair length, etc. for law enforcement personnel are entitled to a presumption of validity. Kelley v. Johnson, 425 U.S. 238, 247 (1976)(it is rational for state and local police officials to conclude that "similarity in appearance of police officers is desirable. This choice may be based on a desire to make police officers readily recognizable . . . or a desire for the esprit de corps which such similarity is felt to inculcate within the police force itself.").

18. The Department, more like a police department than most other government agencies, has a significant interest in regulating its personnel, including imposing reasonable uniform requirements, to promote efficiency, foster loyalty and obedience to superior officers, maintain morale and instill public confidence in it officer. See, Kelley; Hughes v. Whitmer, 714 F.2d 1407, 1419 (8th Cir. 1983), cert. denied 465 U.S. 1023 (1984), Gasparinetti v. Kerr, 568 F.2d 311, 315-316 (3d Cir.), cert. denied 436 U.S. 903 (1977).

19. To be afforded the protection of the First Amendment right to refrain from "speech", that is, to be

afforded any First Amendment protection from the requirement that he wear the American flag patch, Troster must prove this conduct is symbolic speech or expressive conduct. To do so, he must show that the wearing of the American flag patch on his corrections officer's uniform is sufficiently imbued with communicative elements, specifically (1) that it is intended to convey the "particularized message he ascribes to it, and (2) that, in the surrounding circumstances, there is a great likelihood that the message would be so understood by the viewers. Steirer. In the factual context and environment of SCI-Greensburg, neither the requirement that each corrections officer wear a flag patch nor Troster's refusal to wear the flag patch on his uniform is expressive conduct or symbolic speech under the threshold test explained in Spence and Steirer.

20. There is no particularized message in the Department's uniform flag patch requirement and the viewer will not perceive the wearing of the American flag patch on a corrections officer's uniform as an improper display of the flag or desecration of the flag. Id. Nor will the viewer receive the message that Troster is being compelled to express a viewpoint contrary to his own, or any viewpoint for that matter. To the contrary, there is no evidence in the record that an observer will understand the American flag patch on the sleeve of the uniform to say anything at all about the wearer's views. See Steirer, 987 F.2d at 997 (plaintiffs have produced no evidence that people in the community who see these students

performing community service are likely to perceive their actions as an expression of a particularized message of their belief . . . ").

21. There is no underlying political or patriotic message in Troster's refusal to wear the American flag patch such as the protest by black police officers against racial discrimination within the City of Columbus' police department, Leonard, and there is no evidence of unequal or biased application of the uniform requirement.

22. Wearing the flag patch on a corrections officer's uniform, whether compelled or voluntary, does not convey agreement or disagreement with all/or any of the many things a flag may symbolize, or the Department's view on the flag. See Steirer, 987 F.2d at 995; cf. Barnette and Lipp.

23. Indeed, the uniforms of various organizations displaying American flag patches on the right sleeve with star fields orientated to the rear supports the Department's position that people in the community are not likely to perceive the wearing of the flag patch in this manner as a desecration of the flag. See Steirer, 987 F.2d at 997.

24. The Court has no doubt Troster sincerely believe that being compelled to wear an American flag patch on his right sleeve with the orientation of the star field to the rear desecrate the ideal of the flag which he has fought to protect, and his sincerity and reverence for

the flag and the democratic ideals it embodies is commendable. Nevertheless, the Court is convinced that the coerced conduct simply does not express or require Troster to express, any opinions, affirmations or beliefs to the contrary. The "particularized message" Troster read into the display of the American flag patch on his uniform is neither intended by the Department nor is it likely the message would be so understood by those who view it. There is no "particularized message" communicated here, in the context of the Union's request and the Department's requirement the American flag patch be worn as part of the standard uniform of a corrections officer, and therefore there is no compelled expressive conduct or symbolic speech.

25. Because the American flag patch uniform requirement does not compel expression and does not require "affirmation of a belief" or symbolize any "attitude of mind," we do not pass the threshold and it is unnecessary to consider the State's interest in implementing this uniform requirement or to conduct the Pickering balancing test. Steirer, 987 F.2d at 997.

26. The Court is not without admiration for Troster' beliefs and for his courage in standing behind them, and it is immaterial whether the Court or others agree with his views. The beauty of the American flag as a symbol is in the eye of the beholder; the beauty of using the American flag as symbolic speech is in the mind of the beholder. Whether any of us believe a particular exercise

of expressive conduct employing the American flag as symbolic speech is beautiful or ugly, nevertheless we each are guaranteed by the First Amendment that we may voice our staunch agreement or our most vocal disagreement with the perceived symbolic content of the message. The Court must also observe it is not overwhelmed by the State's argument that its interests are served by requiring that an American flag patch be worn as part of the corrections officer's uniform. It does not appear that mass insurrection among inmates or corrections officers would break-out if the patch remained an optional item of apparel, nor does the Court discern any other significant adverse consequences that might befall the State Correctional Institutions.

However, under all of the surrounding circumstances, in the context of the Department's uniform regulations, the State simply has not compelled speech, symbolic or otherwise, of Troster in requiring he wear an American flag patch on his right sleeve with the star field to the rear as part of his uniform.

27. There is no reasonable likelihood that Troster will succeed on the merits. Therefore, he is not entitled to a preliminary injunction to prohibit the State from requiring he wear the American flag patch on his corrections officer's uniform in the manner prescribed by DC-ADM 208.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DIETER H. M. TROSTER,	)	Civil Action No.
	)	94-0131
Plaintiff,	)	
	)	
v.	)	
	)	
STATE DEPARTMENT OF CORRECTIONS, JOSEPH D. LEHMAN, COMMISSIONER, AND FREDRIC A. ROSEMEYER, SUPERINTENDENT,	)	
	)	
Defendants.	)	

ORDER OF COURT

AND NOW this 18th day of March, 1994, it is hereby ORDERED that Plaintiff Dieter H. M. Troster's

Motion for Preliminary Injunction (Document No. 2) is DENIED.

Donald J. Lee
United States District Judge

cc: All counsel of record

(2)

Supreme Court, U.S.
FILED
NOV 29 1995
CLERK

NO. 95-699

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

DIETER H.M. TROSTER,
Petitioner

v.

PENNSYLVANIA STATE DEPARTMENT OF CORRECTIONS, *et al.*,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

THOMAS W. CORBETT
Attorney General

BY: JOHN G. KNORR, III
Chief Deputy Attorney General
Chief, Litigation Section
Counsel of Record

AMY ZAPP
Senior Deputy Attorney General

OFFICE OF ATTORNEY GENERAL
15th Floor, Strawberry Square
Harrisburg, PA 17120
PHONE: (717) 783-1471

16 pp

QUESTIONS PRESENTED

1. Whether the Pennsylvania Department of Corrections violates the First Amendment rights of prison guards not to engage in state-compelled expression by requiring them to wear uniforms which include an American flag patch?

2. Whether the Court of Appeals correctly held that petitioner's "symbolic protest" claim is essentially duplicative of his "compelled expression" claim?

LIST OF PARTIES

The parties listed in the petition for certiorari are accurate, except that respondent Joseph D. Lehman, the Commissioner of the Pennsylvania Department of Corrections, has been succeeded in that office by Martin F. Horn, who should be substituted for him. *See* Sup. Ct. R. 35.3.

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STATEMENT OF THE CASE

This case arises out of the denial of a request by the petitioner, a state prison guard, for a preliminary injunction to enjoin the respondents, the Pennsylvania Department of Corrections ("Department") and two of its officials, from disciplining him for his refusal to comply with a departmental regulation requiring all corrections officers to wear an American flag patch on their uniforms. The Court of Appeals agreed with the District Court that, on the specific facts of this case--at least as they had been established at this early stage--preliminary injunctive relief was not warranted as to petitioner's two claims under the First and Fourteenth Amendments: 1) that the mandatory wearing of a flag patch amounted to impermissible "compelled expression;" and 2) that his refusal to wear the flag was protected speech in that it was a "symbolic protest." Pet. App. at 4a-5a.

1. In 1991, at the request of the union representing its prison guards, the Department adopted a regulation which permitted officers to wear an American flag patch on their uniforms if they wished. (*Id.* at 6a). When the Department revised all of its uniform regulations two years later, in February 1993, display of a flag patch on all officers' uniforms became mandatory. (*Ibid.*)[1] Under both regulations, the patch was to be worn in the same manner: on

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[1]Petitioner repeatedly implies that this regulation was enacted as a statement of support for the 1991 Persian Gulf War. Pet. at i, 6, 12 and 15. That is not true and there is no basis in the record for such assertion. Neither the District Court nor the Court of Appeals made any reference to that military action in their opinions , and there was no finding of fact that the challenged regulation, promulgated *two years later*, was in any way motivated by that war.

the uniform shirt's right sleeve with the star field in the upper left corner of the patch oriented toward the rear. (*Ibid.*) The Department's uniform regulations, including the one regarding the flag patch, were adopted for the purpose of fostering the image of a professional corrections force, something important to the overall operation and security of its prisons. (*Id.* at 6a-7a). Display of the flag patch fosters loyalty and obedience to superior officers and signifies that the wearer is authorized to exercise the lawful powers of his position. (*Ibid.*)

Petitioner refused to comply with the Department's flag patch regulation. (*Id.* at 7a). He believes that the required wearing of the flag desecrates and debases it. To him, the mandatory display is "deeply objectionable not only because of his conviction that the American flag symbolizes freedom from state-coerced political or patriotic speech, but also because, in his view, displaying the flag with its star field to the rear signifies cowardice and retreat from the principles for which the flag stands." (*Ibid.*)

2. When the Department attempted to discipline petitioner for refusing to comply with its regulation, he brought this action and applied for a preliminary injunction. (*Ibid.*) After an evidentiary hearing, the District Court found that there was

> no particularized message in the [Department's] uniform flag patch requirement and the viewer will not perceive the wearing of the American flag patch on a corrections' officer's uniform as an improper display of the flag or desecration of the flag . . . Nor will the viewer receive the message that [petitioner] is being compelled to express a viewpoint contrary to his own, or any viewpoint for that

matter. To the contrary, *there is no evidence in the record that an observer will understand the flag patch on the sleeve of the uniform to say anything at all* about the wearer's views.

(*Id.* at 550) (emphasis added). Absent evidence of any discernible--let alone particularized--message, the District Court concluded that petitioner had failed to meet his burden of showing a substantial likelihood of success on the merits of his claims and denied his motion. (*Id.* at 57a-58a).

3. While petitioner's ensuing appeal to the Third Circuit was pending, this Court decided *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, ___ U.S. ___, 115 S.Ct. 2238 (1995), and the Court of Appeals re-examined the evidence before the District Court in line with the analysis required by that case. It concluded that, even without the need to establish the communication of some 'particularized message,' as its prior case law had required, *see, e.g., Steirer by Steirer v. Bethlehem Area School District*, 987 F.2d 989 (3d Cir. 1993), petitioner still had "not at this time met his burden," (*id.* 19a). Since the wearing of the flag patch here was found by the District Court to convey *no* message of any kind--a finding that was "sufficiently supported by the current record," (*ibid.*)--the Court of Appeals concluded that petitioner had "not made the necessary threshold showing that he was (probably) coerced to engage in expressive conduct." (*Ibid.*)

Again stressing that its ruling was based, in critical part, on the record of this case, the Court of Appeals held that petitioner could not maintain his "symbolic protest" claim. "[U]nder the particular facts of this case," the Third Circuit said, petitioner had "not stated an analytically independent

claim of constitutional violation." (*Id.* at 5a). It reasoned that

> [o]ne who violates a governmental compulsion to speak or engage in expressive conduct merely to express opposition to that compulsion on 'compelled expression' grounds engages in no independently constitutionally protected conduct. In such a case the appropriate rubric for a First Amendment claim is simply 'compelled expression' . . . .

(*Id.* at 5a). Any "symbolic protest' claim in such circumstances,the Court of Appeals observed, is "essentially duplicative" (*id.* at 23a), and as a practical matter, cannot succeed where "the root expressive conduct claim failed." (*Id.* at 24a, n. 7). It therefore only addressed petitioner's "compelled expression" claim, (*id.*) and found it lacking on the existing record. (*Ibid.*)

REASONS FOR DENYING THE WRIT

I. THE VALIDITY OF THE FLAG PATCH REGULATION IS A FACT-INTENSIVE INQUIRY WHICH THE COURT OF APPEALS CORRECTLY RESOLVED IN ACCORDANCE WITH THE DECISIONS OF THIS COURT AND OF OTHER COURTS OF APPEALS.

The petitioner says that his "compelled expression" claim--his claim that the flag patch regulation forces him to engage in state-coerced speech--presents an important First Amendment claim on which the Courts of Appeals are in disarray, and on which further guidance from the Court is needed. Pet. 11-17. He is mistaken.

A. There Is No Conflict Among the Courts of Appeals.

The Court of Appeals correctly pointed out that not every act constitutes expressive conduct which falls under the protection--or, as here, the restrictions--of the First Amendment. Pet. App. 19a, 21a-23a, *citing Barnes v. Glen Theatre Inc.*, 501 U.S. 560, 576 (1991)(Scalia, J., concurring); *Cox v. Louisiana*, 379 U.S. 536, 554 (1965). As the Court has said, not even every action involving the flag is "automatically ... expressive." *Texas v. Johnson*, 491 U.S. 397, 405 (1989). Rather, "characterizing such action for First Amendment purposes" is a fact-intensive inquiry, highly dependent "on the context in which [the action] occurred." *Ibid. See also Connick v. Myers*, 461 U.S. 138, 147-48 (1982)(protected status of public employee's speech to be

determined "by the content, form and context ... as revealed by the whole record").

The petitioner claims that the Court of Appeals' decision in this case conflicts with that of the Eleventh Circuit in *Leonard v. City of Columbus*, 705 F.2d 1299 (11th Cir. 1983), and of the Eighth Circuit in *Dunn v. Carroll*, 40 F.3d 287 (8th Cir. 1994), but this is not so. In both *Leonard* and *Dunn*, as here, each court properly examined the conduct at issue in light of all the surrounding facts; and while the facts--and therefore the results--varied, there is no difference in principle among the courts of appeals.

Leonard involved a group of black police officers who simultaneously removed the flag patches from their uniforms as part of a public demonstration protesting perceived racial discrimination in the police department, *id.*, 705 F.2d at 1300-01; while in *Dunn*, a fire department employee added a flag patch to his uniform as a comment on the then-current situation in the Persian Gulf, where the United States was preparing for the attack on Iraq which occurred in January of 1991. *Id.*, 40 F.3d at 291. In both cases, the court held that this conduct constituted protected speech.

In this case, however, there is no evidence that the flag patch regulation was intended, or was perceived, as "making some sort of ... point." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, ___ U.S. ___, 115 S.Ct. 2338, 2345 (1995). The petitioner simply

> presented the district court with no evidence ... suggesting that anyone ... would be likely to view the wearing of the patch as communicative or expressive, or that people who wear such uniforms with such flag patches actually assert anything to anyone.

Pet. App. 18a. The Court of Appeals thus correctly held that the flag patch regulation does not constitute expressive conduct, but also stressed that its holding was based on the facts, as they now stand, of this case, which is still in its preliminary stages. Pet. App. 4a-5a, 13a, 18a-21a. This approach is completely in accord with both *Leonard* and *Dunn*, as well as with the decisions of the Court.

The petitioner, straining to manufacture a conflict where none exists, repeatedly implies that the flag patch regulation, like the conduct in *Dunn*, was adopted as an expression of support for the 1991 Persian Gulf War. Pet. i, 6, 12, 15. As we pointed out above, at p. 2, n. 1, this is not so. The flag patch regulation, and petitioner's opposition to it, date not from 1991 but from 1993, Pet. App. 6a-7a, 37a; and there is no suggestion from either of the courts below that the regulation, or petitioner's opposition to it, is in any way connected to the Persian Gulf War. *See* Pet. App. 40a (discussing "sole[]" reason for petitioner's opposition).

Petitioner's "conflict" among the courts of appeals is thus illusory. The Court of Appeals resolved this case by properly applying well-established principles of law; and while the petitioner may disagree with the outcome, this alone does not justify review by the Court.

B. *There Is No Reason for the Court to Revisit Its Decision in* Hurley.

Petitioner, however, says that the Court should take this case in order to revisit its decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, supra*. Pet. 13-17. According to the petitioner, the Court's rationale in *Hurley* is essentially without content, Pet. 14 (characterizing *Hurley* as "[d]efining 'communication' as something that has sufficient elements of communication"),

leaving lower courts and the public without guidance in attempting to "gauge the expressiveness of conduct." *Ibid.*

Hurley, however, is, as of this writing, less than six months old, and it is surely premature to conclude that it is "unsound in principle [or] unworkable in practice," *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546 (1985). To date, the only case to apply *Hurley* in this context has been this one,[2] and the Court of Appeals expressed no difficulty in doing so. *Cf. Planned Parenthood v. Casey*, 947 F.2d 682, 698 n.14 (3d Cir. 1991)(subsequent history omitted)(comparing the task of applying the Court's abortion precedents to "read[ing] ... tea leaves"). If the Court is ultimately to revisit *Hurley*, the issue will certainly benefit from further seasoning in the lower courts.

II. THE COURT OF APPEALS CORRECTLY DISPOSED OF PETITIONER'S "SYMBOLIC PROTEST" THEORY AS DUPLICATIVE OF HIS "COMPELLED SPEECH" THEORY.

The Court of Appeals, having rejected petitioner's "compelled speech" theory, likewise rejected the theory that his refusal to wear the flag patch is a "symbolic protest" independently entitled to First Amendment protection. Pet. App. 20a-33a. The Court of Appeals' "narrow conclusion," Pet. App. 20a, was that, under the circumstances of this case, the petitioner's symbolic protest theory is not "analytically

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[2]In addition, three district court decisions cite *Hurley*, but in other contexts. *See Pro v. Donatucci*, No. 94-6001 (E.D. Pa., Sept. 18, 1995) [1995 Westlaw 552980](First Amendment protects conduct as well as speech); *Schwitzgebel v. City of Strongsville*, 898 F.Supp. 1208, 1218 (N.D. Ohio 1995)(significance of alternative channels of communication); *Elzie v. Aspin*, 897 F.Supp. 1, 5 (D.D.C. 1995)(self-identification of sexual orientation may contain specific message).

independent" of his compelled speech theory, but rather is "wholly derivative," Pet. App. 27a, and "essentially duplicative," Pet. App. 23a, of it.

The Court of Appeals could conceive of no circumstances in which the petitioner's symbolic protest theory could succeed once his compelled speech theory had failed. Pet. App. 24a, n. The petitioner has not attempted to rebut this point, and the Court should decline to consider a theoretical issue which can have no practical impact on the outcome of this case.

CONCLUSION

For these reasons, the respondents ask the Court to deny the writ of certiorari.

Respectfully submitted,

THOMAS W. CORBETT, JR.
Attorney General

JOHN G. KNORR, III
Chief Deputy Attorney General
Chief, Litigation Section

AMY ZAPP
Senior Deputy Attorney General

OFFICE OF ATTORNEY GENERAL
15th Floor, Strawberry Square
Harrisburg, PA 17120
PHONE: (717) 783-1471

DATE: November 29, 1995